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ATTORNEYS FOR DEFENDANTS
KIM EMBRY AND NOAM GLICK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

B&G FOODS NORTH AMERICA, INC.,

Plaintiff,

v.

KIM EMBRY and NOAM GLICK, acting in the
purported public interest of the general public of
the State of California,

Defendants.

Case No. 2:20-cv-00526-KJM-DB

JOINT STATUS REPORT

Date: July 8, 2022
Time: 10:00 a.m.
Judge: Hon. Kimberly Mueller
Courtroom: 3
Action Filed: March 6, 2020

1 Plaintiff B&G Foods North America, Inc. (“B&G Foods”), Defendant Kim Embry, and
 2 Defendant Noam Glick (“Defendants”) hereby submit the following Joint Status Report pursuant to
 3 the Court’s Minute Order issued on May 10, 2022. (ECF No. 42.)

4 **A. Summary of Claims and Legal Theories**

5 **B&G Foods:** B&G Foods distributes Snackwell’s Devil’s Food Cookie Cakes, a chocolate
 6 cookie with a marshmallow and chocolate topping, and Snackwell’s Chocolate Crème Sandwich
 7 Cookies, a cookie sandwich made from two chocolate cookies and a chocolate filling. Defendants,
 8 acting on behalf of the State of California, seek to force B&G Foods to place a false Proposition 65
 9 cancer warning on its Cookie Cakes and Sandwich Cookies. Such warning would be false because
 10 there is no evidence that dietary acrylamide, which is present in virtually every cooked food, poses
 11 any risk of cancer – a fact which has been confirmed by the FDA, EPA, the International Agency
 12 for Research on Cancer, and every other scientific or regulatory body that has researched this
 13 matter. Even the State of California has admitted it does not “know” that acrylamide in food poses
 14 any danger. Requiring B&G Foods to place an acrylamide warning on its Cookie Cakes would be
 15 falsely compelled speech, and thus violates the First Amendment under *Central Hudson Gas &*
 16 *Electric Corp v. Public Services Commission*, 447 U.S. 557 (1980) and *Zauderer v. Office of*
 17 *Disciplinary Counsel*, 471 U.S. 626 (1985). Further, as applied to B&G Foods’s backed goods,
 18 Proposition 65 is impermissibly vague. Specifically, its “cooking exemption” and “No Significant
 19 Risk Level” provisions and related regulations do not provide B&G Foods with sufficient notice of
 20 whether their conduct is illegal.

21 As a result of Defendants’ unconstitutional conduct, B&G Foods has incurred significant
 22 legal fees and related costs to defend against Defendants’ unconstitutional conduct. B&G Foods
 23 accordingly brings this action for damages under 42 U.S.C. § 1983.

24 On October 7, 2020, the Court granted Defendants’ motion to dismiss. B&G Foods timely
 25 appealed, and the Ninth Circuit held that “[t]he district court properly concluded that B&G’s §
 26 1983 suit is barred by the *Noerr-Pennington* doctrine, given the allegations in the complaint. But
 27 the district court erred in denying leave to amend because it is unclear whether amendment would
 28 be futile. We therefore reverse the dismissal of B&G’s complaint and remand to allow B&G an

opportunity to amend.” *B&G Foods N. Am., Inc. v. Embry*, 29 F.4th 527, 542 (9th Cir. 2022). The Ninth Circuit’s Mandate issued on May 4, 2022. B&G Foods will file its Amended Complaint prior to the case management conference scheduled for July 8, 2022.

Defendants: B&G Foods filed this retaliatory federal action – hoping to obtain a perceived more favorable forum to litigate its constitutional defenses – in response to an earlier-filed California state court action by Defendant Kim Embry, through her counsel, Defendant Noam Glick. The first-in-time state court action concerns Embry’s allegation, acting as a private enforcer of Proposition 65, that B&G Foods failed to sufficiently warn consumers in California about the exposure to acrylamide in its Cookie Cakes.

On May 1, 2020, Embry and Glick moved to dismiss B&G Foods’ complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), on the following grounds: (1) absence of state action; (2) the Anti-Injunction Act; and (3) immunity under the *Noerr-Pennington* doctrine.

On October 7, 2020, the Court dismissed B&G Foods’ complaint based on the *Noerr-Pennington* doctrine and denied leave to amend based on futility.

On October 8, 2020, B&G Foods filed a Notice of Appeal.

On March 17, 2022, the Ninth Circuit affirmed this Court’s ruling that B&G Foods’ § 1983 suit is barred by the *Noerr-Pennington* doctrine, but reversed this Court’s dismissal to permit amendment “[b]ecause it was unclear whether B&G could allege the application of the sham exception to *Noerr-Pennington* doctrine in an amended complaint.”

On April 26, 2022, the Ninth Circuit denied B&G Foods’ petition for a rehearing en banc.

On May 4, 2022, the Ninth Circuit’s Mandate issued.

Defendants will file another motion to dismiss B&G Foods’ Amended Complaint. Given the futility of any further amendment, Defendants also anticipate filing a motion for sanctions under Rule 11.

B. Status of Service upon all Defendants and Cross-Defendants

B&G Foods has served all defendants, and there are no cross-defendants.

C. Possible Joinder of Additional Parties

The parties do not currently anticipate joinder of any additional parties.

1 **D. Proposed Amendments**

2 B&G Foods has amended its complaint.

3 **E. Statutory Bases for Jurisdiction and Venue**

4 The Court has jurisdiction over this action under 28 U.S.C. § 1331, which confers original
5 jurisdiction on federal district courts over actions arising under the Constitution or laws of the
6 United States. B&G Foods's motion to transfer the venue of this matter to the Northern District of
7 California has been denied. (ECF No. 25.)

8 **F. Anticipated Discovery and the Scheduling of Discovery**

9 **B&G Foods:** There is no reason to delay discovery in this case. These issues are
10 straightforward and clearly defined. Defendants are presently seeking discovery from B&G Foods
11 in a state court action they commenced. Defendants should not be permitted to use the filing of a
12 motion to dismiss to evade their discovery obligations in this court while simultaneously seeking
13 discovery from B&G Foods on other issues by virtue of their state-court filing. Accordingly, B&G
14 Foods proposes the discovery plan set forth below.

15 **Defendants:** Defendants contend that discovery should be stayed until the Court decides its
16 *second* Motion to Dismiss under Rule 12(b)(6). If B&G Foods serves discovery prior to the Court
17 ruling on this Motion to Dismiss, Defendants intend to file a Motion to Stay Discovery. A modest
18 stay of discovery would conserve significant party and judicial resources, avoiding the possibility
19 of Defendants spending large sums on discovery in a case with no legal basis. Moreover, a stay of
20 discovery would be warranted because the Motion to Dismiss involves threshold issues such as
21 jurisdiction and standing, and their resolution in Defendants' favor would result in this case being
22 dismissed in its entirety.

23 **1. Initial Disclosures**

24 **B&G Foods:** B&G Foods is prepared to exchange its initial disclosures on or before July 5,
25 2022.

26 **Defendants:** Defendants request a deadline set for three weeks after the Court's ruling on
27 their second Motion to Dismiss.
28

1 **2. Subjects on Which Discovery May Be Needed, When Discovery Should**
 2 **be Completed, and Whether Discovery Should be Conducted in Phases**

3 **B&G Foods:** B&G Foods anticipates seeking discovery of information in the possession of
 4 Defendants relating to whether acrylamide in Cookie Cakes or Sandwich Cookies poses any risk of
 5 harm, what the State of California knows about this subject, and Defendants' conduct related to the
 6 constitutional violations alleged in the complaint. There is no need to phase discovery. As set
 7 forth below, B&G Foods believes discovery should be completed in approximately nine months.

8 **Defendants:** In the unlikely event this case is not dismissed again, Defendants anticipate
 9 seeking discovery from B&G Foods regarding its claims, including its contention that acrylamide
 10 poses no risk of harm to consumers. Like B&G Foods, Defendants agree that phased discovery is
 11 unnecessary. Defendants believe that discovery should be completed one (1) year following the
 12 Court's ruling on its second Motion to Dismiss.

13 **3. Proposed Changes to FRCP Discovery**

14 **B&G Foods:** B&G Foods does not propose any changes to the limits on discovery set forth
 15 in the Federal Rules of Civil Procedure.

16 **Defendants:** Defendants propose that discovery be stayed until the Court decides its second
 17 Motion to Dismiss. Otherwise, Defendants concur with B&G Foods that no changes are necessary
 18 to the limits on discovery set forth in the Federal Rules of Civil Procedure.

19 **4. Expert Witness Disclosures**

20 **B&G Foods:** B&G Foods proposes that affirmative expert disclosures be made by
 21 December 7, 2022, and rebuttal expert disclosures be made by January 4, 2023.

22 **Defendants:** In the unlikely event this case is not dismissed again, Defendants propose that
 23 expert disclosures be set three (3) months after the Court issues a ruling on its second Motion to
 24 Dismiss.

25 **5. Discovery Cutoff**

26 **B&G Foods:** B&G Foods proposes that non-expert discovery conclude by October 28,
 27 2022.

28 **Defendants:** To the extent this case is not dismissed again, Defendants propose that the
 discovery cutoff be one (1) year following the Court's ruling on its second Motion to Dismiss.

G. Dispositive and Non-Dispositive Motions

B&G Foods: B&G Foods anticipates filing a motion for summary judgment. B&G Foods proposes that its motion be heard on or about February 28, 2023.

Defendants: In the unlikely event this case is not dismissed again, Defendants anticipate filing a motion for summary judgment or other dispositive motion. Defendants propose that dispositive motion hearings occur one (1) year following the Court's ruling on its second Motion to Dismiss.

H. Unnecessary Proof/Cumulative Evidence and Expert Limitations

The parties will endeavor to stipulate to undisputed facts in order to limit unnecessary or cumulative discovery. The parties do not currently anticipate any limitations or restrictions on the use of testimony under Federal Rule of Evidence 702.

I. Final Pretrial Conference

B&G Foods: B&G Foods proposes that the final pretrial conference be held 14 days before the trial date.

Defendants: In the unlikely event this case is not dismissed again, Defendants propose that the final pretrial conference be held eighteen (18) months following the Court's ruling on its second Motion to Dismiss.

J. Trial

B&G Foods: B&G Foods estimates that a 2 to 3 day bench trial will be necessary. B&G Foods proposes that this trial be scheduled to commence on the week of March 27, 2023, pending the availability of the Court.

Defendants: In the unlikely event this case is not dismissed again, Defendants estimate a 5-day bench trial and propose that trial be held twenty (20) months following the Court's ruling on its second Motion to Dismiss.

K. Magistrate Judge

The parties have not consented to the jurisdiction of a U.S. Magistrate Judge.

L. Pretrial Procedures

The parties do not currently propose any changes to the standard pretrial procedures.

1 **M. Related Cases Pending In This District**

2 **B&G Foods:** B&G Foods is not aware of any related matter pending in this Court or any
3 other Court, including any Bankruptcy Court. As addressed in its opposition to the motion to
4 dismiss, B&G Foods disputes Defendants' contention that this case is duplicative of any state court
5 proceeding. B&G Foods also disputes that this case is related to the *CalChamber* case cited by the
6 Defendants, as that case involves prospective claims for relief brought by an association
7 representing numerous businesses. To the extent pending cases in this district are relevant,
8 Defendants neglect to mention Judge Shubb recently enjoined the State from enforcing a similarly
9 unconstitutional Proposition 65 regulation that would have mandated a false cancer warning for the
10 herbicide glyphosate. *National Association of Wheat Growers v. Becerra*, 2:17-cv-2401 WBS
11 EFB, Dkt. No. 155 (E.D. Cal. June 22, 2020).

12 **Defendants:** *California Chamber of Commerce v. Becerra*, 2:19-CV-02019-KJM-EFB,
13 (E.D.C.A., filed Oct. 7, 2019). In this related case, the California Chamber of Commerce seeks to
14 enjoin private enforcers of Proposition 65 from suing its members for failing to provide warnings
15 for exposures to acrylamide from food and beverage products.

16 **N. Settlement**

17 The parties do not believe that this case is conducive to settlement and agree that this case
18 does not warrant referral to Voluntary Dispute Resolution or a court-convened settlement
19 conference.
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1 Dated: June 24, 2022

Respectfully Submitted,

2 BRAUNHAGEY & BORDEN LLP

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4 By: s/ J. Noah Hagey

J. Noah Hagey

5 Attorneys for Plaintiff
6 B&G FOODS NORTH AMERICA,
INC.

7 Dated: June 24, 2022

Respectfully Submitted,

8 NICHOLAS & TOMASEVIC, LLP

9
10 By: s/ Jake Schulte

Jake Schulte

11 Dated: June 24, 2022

Respectfully Submitted,

12 GLICK LAW GROUP, P.C.

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14 By: s/ Noam Glick

Noam Glick

15 Attorneys for Defendants
16 KIM EMBRY AND NOAM GLICK
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